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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 PHYLLIS LINDA WILLIAMS,) NO. ED CV 10-871-E
12)
13 Plaintiff,)
14)
15 v.) MEMORANDUM OPINION
16)
17 MICHAEL J. ASTRUE, COMMISSIONER) AND ORDER OF REMAND
18 OF SOCIAL SECURITY ADMINISTRATION,)
19)
20 Defendant.)
21 _____)
22
23

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25 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
26 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
27 judgment are denied and this matter is remanded for further
28 administrative action consistent with this Opinion.

23 PROCEEDINGS
24

25 Plaintiff filed a Complaint on June 22, 2010, seeking review of
26 the Commissioner's denial of benefits. The parties filed a consent to
27 proceed before a United States Magistrate Judge on July 9, 2010.

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1 Plaintiff filed a "Notice of Plaintiff's Motion for Summary
2 Judgment or Remand" and a supporting memorandum ("Plaintiff's Memo")
3 on December 20, 2010. Defendant filed a "Notice of Motion and Motion
4 for Summary Judgment" on January 19, 2011. The Court has taken both
5 motions under submission without oral argument. See L.R. 7-15;
6 "Order," filed June 23, 2010.

7
8 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
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10 On February 9, 2006, Plaintiff applied for disability benefits
11 beginning April 1, 2005 (Administrative Record ("A.R.") 41).
12 Plaintiff reported she had suffered a back injury that precluded her
13 from standing for more than one hour out of an eight-hour day, and
14 precluded her from lifting more than 20 pounds (A.R. 103). As
15 discussed below, Plaintiff similarly testified on April 24, 2008 to
16 pain and other symptomatology of allegedly disabling severity (A.R.
17 11-27).

18
19 On May 30, 2008, an Administrative Law Judge ("ALJ") found
20 Plaintiff not disabled through the date of the decision (A.R. 38-48).
21 The ALJ found that Plaintiff retained the ability to do a limited
22 range of light work with no mental limitations, and could perform her
23 past relevant work as an underwriter (A.R. 44, 47 (adopting vocational
24 expert testimony)). In denying benefits, the ALJ found Plaintiff's
25 testimony credible only to the extent consistent with the residual
26 functional capacity the ALJ determined to exist (A.R. 44-45).

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1 In the context of a later-filed application for benefits, the
2 Administration found Plaintiff disabled under the Grids (Medical-
3 Vocational Rule 202.06) beginning August 22, 2008, the date of
4 Plaintiff's 60th birthday (Plaintiff's Memo at 4-5; Exhibit A to
5 Plaintiff's Memo). In the present case, the Court has not considered
6 this subsequent Administrative decision, except insofar as to
7 determine that the subsequent decision does not compel reversal or
8 remand under 42 U.S.C. section 405(g).¹

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13 ¹ To the extent Plaintiff may be asserting that the
14 subsequent Administrative decision should have preclusive effect in
15 these proceedings or somehow is material to the Court's
16 consideration of the issues herein (see Plaintiff's Memo at 5), the
17 Court declines so to find. The disability issue in the two
18 administrative proceedings was not identical (e.g., the later
19 application involved a different time period, additional medical
20 evidence, and a different age classification). Any determination
21 rendered on the later application is not material to, or binding
22 on, the present application. See Bruton v. Massanari, 268 F.3d
23 824, 827 (9th Cir. 2001) (finding second ALJ's subsequent decision
24 to award benefits was not inconsistent with prior denial where
25 second application involved different medical evidence, a different
26 time period, and a different age classification; remand under 42
27 U.S.C. § 405(g) for consideration of later decision was not
28 warranted); Luna v. Astrue, 2008 WL 2559400, at *2 (D. Ariz. June
23, 2008), aff'd, 623 F.3d 1032 (9th Cir. 2010) (remanding case for
further administrative proceedings, distinguishing Bruton from case
where it is not clear from record whether initial denial and
subsequent award are reconcilable or inconsistent); see also Otero
Suarez v. Barnhart, 2005 WL 2305012, at *3 (C.D. Cal. Sept. 21,
2005) (finding no issue preclusion from decision in administrative
proceeding where proceeding involved different time period; issues
were not identical); cf. Stubbs-Danielson v. Astrue, 539 F.3d 1169,
1173 (9th Cir. 2008) (declining to extend principles of res
judicata announced in Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir.
1988) to create a rebuttable presumption of disability where there
is a prior finding of disability).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see Widmark v. Barnhart, 454 F.3d 1063, 1067 (9th Cir. 2006).

DISCUSSION

The Administration erred in evaluating Plaintiff's credibility. Plaintiff testified that she could not perform her past relevant work because she could not sit for more than an hour, and could not stand because her legs assertedly get numb due to her back injury (A.R. 11). Plaintiff said she had to move around, lie down or otherwise change positions because she gets muscle cramps (A.R. 19-20). Plaintiff thought she could sit for "maybe" 35 to 45 minutes before having to get up and move around (A.R. 20). Plaintiff added that if she had pain medication, she "might be able to" get through eight hours without lying down but she did not think she could (A.R. 20).

Plaintiff explained that she has good and bad days, and that on bad days she lies down for up to five hours from breakfast until the

1 afternoon (A.R. 20-21). Plaintiff said she had not applied for jobs
2 like her past relevant work because she did not think she could work
3 that kind of a job for eight hours a day (A.R. 23). At one point,
4 Plaintiff testified she thought that if she did not have physical
5 problems she "absolutely" could work and said she had no mental
6 problems "that [she] knew of, yet" (A.R. 12). When Plaintiff
7 explained why she thought she could not work an eight-hour day,
8 however, she said she had problems with "concentration, [] when your
9 legs and your back is [sic] bothering you, you can't stay doped up all
10 the time. You got to, you got to be real with yourself, you know"
11 (A.R. 24). Plaintiff added that her medications may make her fall
12 asleep or "say something you shouldn't say or you just wouldn't be as
13 professional. I am a professional and I, and I just don't trust
14 myself to do that" (A.R. 24).

15
16 The ALJ found that Plaintiff's "medically determinable
17 impairments could reasonably be expected to produce the alleged
18 symptoms; however, [Plaintiff's] statements concerning the intensity,
19 persistence and limiting effects of these symptoms are not credible to
20 the extent they are inconsistent with the residual functional capacity
21 assessment" (A.R. 46). To support such a credibility determination,
22 at a minimum the ALJ must make "specific, cogent" findings, supported
23 in the record. See Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir.
24 2010); Robbins v. Social Security Administration, 466 F.3d 880, 883
25 (9th Cir. 2006); Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)
26 (citing Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) and Rashad
27 v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990)); Moisa v. Barnhart,
28 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's credibility findings

1 "must be sufficiently specific to allow a reviewing court to conclude
 2 the ALJ rejected the claimant's testimony on permissible grounds and
 3 did not arbitrarily discredit the claimant's testimony"); Holohan v.
 4 Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ must
 5 "specifically identify the testimony [the ALJ] finds not to be
 6 credible and must explain what evidence undermines the testimony");
 7 Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) ("The ALJ must
 8 state specifically which symptom testimony is not credible and what
 9 facts in the record lead to that conclusion."); see also Social
 10 Security Ruling 96-7p.² The ALJ failed to do so in the present case.

11
 12 While the ALJ stated that Plaintiff "said she had no psychiatric
 13 problems" (A.R. 44), the ALJ failed to discuss Plaintiff's testimony
 14 that she believed she could not work an eight-hour day due to problems
 15 with concentration caused by her pain and problems with falling asleep
 16 or making inappropriate remarks due to the effects of her pain

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 18
 19 ² In the absence of evidence of "malingering," most recent
 20 Ninth Circuit cases have applied the arguably more rigorous "clear
 21 and convincing" standard. See, e.g., Brown v. Astrue, 2010 WL
 22 5066039, at *1 (9th Cir. Dec. 10, 2010); Valentine v. Commissioner,
 23 574 F.3d 685, 693 (9th Cir. 2009); Carmickle v. Commissioner, 533
 24 F.3d 1155, 1160 (9th Cir. 2008); Lingenfelter v. Astrue, 504 F.3d
 25 1028, 1036 (9th Cir. 2007); Robbins, 466 F.3d at 883; Moisa v.
 26 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Connett v. Barnhart,
 340 F.3d 871, 873 (9th Cir. 2003); Ballard v. Apfel, 2000 WL
 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting cases).
 In the present case, the ALJ's findings are insufficient under
 either standard, so the distinction between the two standards (if
 any) is academic.

27 The Court notes it may cite unpublished Ninth Circuit opinions
 28 issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir.
 Rule 36-3(b); Fed. R. App. P. 32.1(a).

1 medication.³ While an ALJ is not required to believe every allegation
 2 of disabling pain or other non-exertional impairment, Orn v. Astrue,
 3 495 F.3d 625, 635 (9th Cir. 2007), the ALJ should have discussed the
 4 aforementioned testimony and explained the weight given to that
 5 testimony, especially given the fact that the vocational expert
 6 testified that a person precluded from performing detailed or complex
 7 tasks could not perform Plaintiff's past relevant work as an
 8 underwriter (A.R. 33-34). See generally 20 C.F.R. § 404.1529(c)(3)
 9 (noting that the Administration will "carefully consider" information
 10 a claimant may submit about her symptoms). From the record, the Court
 11 cannot determine whether the ALJ failed to consider this potentially
 12 material testimony, rejected the testimony for permissible reasons,⁴
 13 or rejected the testimony for impermissible reasons.

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18 ³ The regulations recognize that pain (or drugs taken to
 19 alleviate pain) may cause mental limitations that affect what a
 20 claimant may do in a work setting. See, e.g., 20 C.F.R. §
 21 404.1545(a)(1) ("Your impairment(s), and any related symptoms, such
 22 as pain, may cause physical and mental limitations that affect what
 23 you can do in a work setting. . . . We will assess your residual
 24 functional capacity based on all relevant evidence in your case
 record."); 20 C.F.R. § 404.1529(c)(3) ("Factors relevant to your
 symptoms, such as pain, . . . include . . . [t]he type, dosage,
 effectiveness, and side effects of any medication you take or have
 taken to alleviate your pain or other symptoms.").

25 ⁴ The Court cannot affirm the administrative decision based
 26 on reasons for rejecting this testimony suggested for the first
 27 time in Defendant's motion. See Connett v. Barnhart, 340 F.3d at
 28 874 (district court cannot affirm on the basis of evidence the ALJ
 failed to discuss); Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir.
 2001) (court "cannot affirm the decision of an agency on a ground
 that the agency did not invoke in making its decision").

1 Plaintiff argues that the Court should direct the payment of
2 disability benefits to Plaintiff or alternatively to "credit as true"
3 the disputed testimony of Plaintiff and remand for proceedings
4 consistent therewith. See Plaintiff's Memo at 10. The "crediting as
5 true" rule is not mandatory. See Connett v. Barnhart, 340 F.3d at 876
6 (remand is an option, and the "crediting as true" rule is not
7 mandatory, where the ALJ stated insufficient reasons for rejecting a
8 claimant's excess pain testimony); but see Lingenfelter v. Astrue, 504
9 F.3d at 1041 n.12 (appearing to suggest that remand is not an option
10 where the ALJ failed to state a legally sufficient basis for rejecting
11 a claimant's testimony); see also Vasquez v. Astrue, 572 F.3d 586, 593
12 (9th Cir. 2009) (noting but not resolving the intra-circuit conflict;
13 rule is not mandatory where there are "outstanding issues that must be
14 resolved before a proper disability determination can be made"). Even
15 if the Court were to accept Plaintiff's testimony as true, there would
16 remain issues to be resolved before a proper determination could be
17 made. Plaintiff testified that her back problems and leg numbness got
18 worse after she stopped working on April 1, 2005 (the alleged onset
19 date) (A.R. 14-17, 103). The record shows that Plaintiff began taking
20 prescribed pain medication for her back some time after February 10,
21 2006. See A.R. 116, 118 (Disability Report - Appeal first noting pain
22 medication); see also A.R. 136 (Complete Orthopedic Evaluation dated
23 March 23, 2006, noting Plaintiff was taking only blood pressure
24 medication); A.R. 151 (treatment note dated April 17, 2006, indicating
25 Vicodin prescribed for "occasional back pain"). By December 29, 2006,
26 Plaintiff complained to her treating physician that her pain was
27 worsening and interfering with her activities of daily living and
28 sleep (A.R. 176). The ALJ did not reach the issue of when Plaintiff's

1 alleged disability may have begun. The testimony and evidence that
2 Plaintiff wants credited does not identify when after the alleged
3 onset date Plaintiff's concentration may have been so limited by her
4 pain as to be disabling. Similarly, the testimony and evidence that
5 Plaintiff wants credited does not identify when Plaintiff's ability to
6 stay awake and on task may have been so limited by taking pain
7 medication as to be disabling. See A.R. 20. Thus, application of the
8 "credit as true" rule in this case would not result in the immediate
9 payment of benefits.

10
11 The Court declines to apply the non-mandatory "credit as true"
12 rule. This case is appropriate for remand for further administrative
13 proceedings. See, e.g., Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir.
14 2010) (finding no error in remanding case without applying "credit as
15 true" rule in similar circumstances); see generally INS v. Ventura,
16 537 U.S. 12, 16 (2002) (upon reversal of an administrative
17 determination, the proper course is remand for additional agency
18 investigation or explanation, except in rare circumstances).⁵

19
20 LET JUDGMENT BE ENTERED ACCORDINGLY.

21
22 DATED: March 7, 2011.

23
24 _____/S/_____
25 CHARLES F. EICK
26 UNITED STATES MAGISTRATE JUDGE

27
28 ⁵ The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the payment of benefits would not be appropriate at this time.